



S t r a t e g i c E n e r g y L L C

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March 23, 2005

Docket Office
California Energy Commission
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

RE: Entry in Docket 04-IEP-1D

To Whom It May Concern:

Enclosed is an original and one copy of Appeal of Executive Director's Decision Partially Denying Application of Strategic Energy, LLC for Designation of Confidential Records.

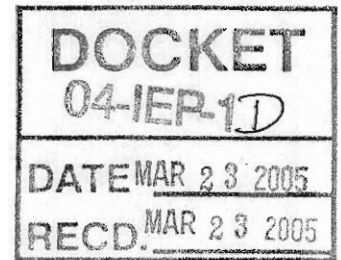
If there are any questions or comments regarding this submission, please feel free to contact me at (412) 644-3120.

Sincerely,

Carl W. Boyd
Regulatory Compliance & Licensing Analyst

Enclosure

State of California
Energy Resources Conservation
And Development Commission



In the Matter of:

The Preparation of the *2005 Integrated Energy Policy Report (2005 Energy Report)*

Docket 04-IEP-1D

**APPEAL OF EXECUTIVE DIRECTOR'S DECISION PARTIALLY DENYING
APPLICATION OF STRATEGIC ENERGY, L.L.C.
FOR DESIGNATION OF CONFIDENTIAL RECORDS**

Pursuant to Section 2505(a)(3) of Title 20 of the California Code of Regulations, Strategic Energy, L.L.C. ("Applicant") hereby appeals the decision of the Executive Director partially denying Applicant's application requesting that information contained in the Electricity Demand Forecast forms and workpapers submitted by Applicant be designated as confidential.

On February 9, 2005, Applicant submitted Demand Forecast forms 1.1, 1.3, 1.6 (Hourly Usage), 2.4, 4 and 6, as well as supporting workpapers. The submittals contain detailed information about Applicant's actual and forecasted annual electricity sales for each customer class, peak demand by sector, hourly loads and load losses, electricity and natural gas prices, and customer counts. In addition, they contain information about Applicant's demand forecast methodology and an uncertainty analysis. At the time Applicant made the submittals, Applicant requested, pursuant to 20 CCR § 2505(a), that the information contained in forms 1.1, 1.3, 1.6, 2.4, 4 and 6 and corresponding workpapers be permanently designated as confidential.

By letter dated March 9, 2005, the Executive Director informed Applicant of his decision concerning Applicant's request for confidentiality. The letter states that confidentiality will be given for three years from the date of the letter to all of the information contained in forms 1.6 and 2.4, and to the geographic (sector) data contained in forms 1.1 and 1.3.¹ With regard to other information contained in forms 1.1 and 1.3, however, the letter states:

All other information contained in forms 1.1 and 1.3 (columns labeled "Total," "Total Peak," and "Average Annual Growth Rate") are deemed public and will not be given confidentiality since this aggregated information is not sufficiently detailed to provide others with a competitive business advantage. [Emphasis added.]

Similarly, with regard to the information contained in forms 4 and 6, the letter states:

¹ The letter further states that confidentiality also will be given to supporting data contained in workpapers "to the extent the information contained therein corresponds to confidential information contained in forms 1.1, 1.3, 1.6 and 2.4 ..."

Strategic Energy's rationale for designation the information contained in forms 4 and 6 is unconvincing since the data contained therein is neither commercially sensitive nor would it *provide your competitors with a competitive advantage* if made public." [Emphasis added.]

Applicant respectfully appeals the Executive Director's decision on the following grounds:

First, the Executive Director applied the wrong standard for determining whether confidentiality should be granted. The Executive Director's letter states that disclosure of the information in question will not provide *others* with a competitive advantage. However, the proper standard is whether disclosure would cause *the filer* a loss of competitive advantage or other harm.² The Executive Director should have applied this standard in reviewing Applicant's request.

Second, Applicant made a reasonable showing that the information and data contained in forms 1.1 and 1.3 are trade secrets and/or that disclosure of the information could cause Applicant to suffer a loss of competitive advantage. The same is true for the information contained in forms 4 and 6. The Commission's regulations provide that the Executive Director "shall" grant an application for confidentiality "if the applicant makes a reasonable claim that the Public Records Act or other law authorizes the Commission to keep the record confidential." (20 CCR § 2505(a)(3)(A).) And the Public Records Act authorizes the Commission to give confidentiality to trade secrets. (See Govt. Code § 6254(k).) Therefore, under the proper standard, the Executive Director should have granted Applicant's request for confidentiality for *all* of the information contained in forms 1.1 and 1.3 for which confidentiality was requested, as well as the information contained in forms 4 and 6.

Third, disclosure of the information about Applicant's actual and forecasted loads contained in forms 1.1 and 1.3 for which confidentiality was requested, including information concerning Applicant's total loads, total peak loads and average annual growth rates, would enable other market participants to determine the amount of load that Applicant had under contract as of the reporting data and the rate at which Applicant's current contracts are scheduled to expire. That information would provide suppliers and competitors with an accurate picture of Applicant's supply and demand portfolios and deduce the types of products/contracts that Applicant offers its customers. Those insights would cause Applicant to suffer a loss of competitive advantage both in terms of negotiating with suppliers and competing for customers. Therefore, the Executive Director erred in not granting confidentiality to all of the information

² The Commission's regulations provide for information to be designated as confidential if it "contains trade secrets or its disclosure would otherwise cause a *loss of a competitive advantage*." (20 CCR § 2505(a)(1)(D). Emphasis added.) The Public Records Act defines trade secrets as any information that "is known only to certain individuals within a commercial concern who are using it ... and which gives its user an opportunity to obtain a *business advantage over competitors* who do not know or use it." (Govt. Code § 6254.7(d). Emphasis added.) And the California Courts generally define "trade secret" as any information "which is used in one's business, and which gives him an opportunity to obtain an *advantage over competitors who do not know or use it* ..." (*Uribe v. Howie*, 19 Cal. App. 3d 194, 207-208 (1971). Emphasis added.)

contained in forms 1.1 and 1.3 for which confidentiality was requested, including Applicant's total loads, total peaks loads and average annual growth rates.

Fourth, three years of confidentiality is inadequate for the information contained in forms 1.1, 1.3, 1.6 and 2.4. The forms contain not only historical information but also information about Applicant's contracted loads through 2016. The sensitivity of that information will not decrease after three years. And while the value of historical information may diminish over time for some market participants (e.g., smaller customers), other market participants (i.e., suppliers, competitors and larger customers) have the sophistication to use such information, especially if later-reported information subsequently made public under the same three-year standard, to gain insight into Applicant's ongoing business strategies. Accordingly, the information contained in forms 1.1, 1.3, 1.6 and 2.4 for which confidentiality has been requested should be kept confidential on a permanent basis. At the very least, the confidentiality period should be extended to ten years and should be "rolling," such that information for a particular year is kept confidential for ten years after the reporting period.

Fifth, the information contained in form 4 is just as commercially sensitive, if not more sensitive, than the information that the Executive Director deemed confidential. Form 4 contains detailed information about Applicant's demand forecast methodology, including formulas and compilations of information, that goes to the heart of how Applicant makes procurement decisions for its customers. As a competitive supplier, procurement is the primary service that Applicant offers, and it would suffer a loss of competitive advantage if other market participants gain insight into its procurement decisions. Accordingly, the Executive Director should have given confidentiality to the information contained in form 4. Moreover, the information should be given permanent confidentiality since it is not time sensitive but rather relates to Applicant's ongoing operations. Applicant would not object, however, to a generalized description of the information contained in form 4 being made public (e.g., in the 2005 Integrated Energy Policy Report), provided that Applicant's identity is kept confidential or other measures are taken (e.g., providing parties that request disclosure a generalized description of the information provided by all ESPs in form 4) to "mask" the source of the information.

Sixth, the information contained in form 6 is also highly sensitive in that it provides insight into Applicant's view of the marketplace and how it operates under the risks and uncertainties that affect its business. An important part of Applicant's business is being able to help customers understand the market and make wise procurement decisions. Allowing competitors to gain access to Applicant's expertise in this regard would cause Applicant to suffer a loss of competitive advantage in terms of attracting and retaining customers, a loss that would be particularly acute given the current suspension of direct access. Accordingly, the Executive Director should have granted confidentiality to the information contained in form 6. Moreover, the information should be given permanent confidentiality since it is not time sensitive but rather relates to Applicant's ongoing operations. Applicant would not object, however, to a *highly* generalized description of the information contained in form 6 being made public, provided that Applicant's identity is kept confidential *and* other measures are taken (e.g., providing a generalized description of the information provided by all ESPs in form 6) to "mask" the source of the information.

For the foregoing reasons, Applicant urges the Commission to grant this appeal and direct the Executive Director to designate as confidential all of the information reported by Applicant in Demand Forecast forms 1.1, 1.3, 1.6, 2.4, 4 and 6 for which confidentiality has been requested. Thank you for your consideration of this appeal.

Respectfully submitted,

STRATEGIC ENERGY, L.L.C.

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